

Convictions under environmental legislation: Aug - Sept 2004

The EPD's summary of conviction recorded and fines imposed during the period August to October 2004 is as follows:

August 2004

25 pollution convictions in August 2004

Twenty-five convictions were recorded in August for breaches of anti-pollution legislation enforced by the Environmental Protection Department.

Seven of the convictions were under the Air Pollution Control Ordinance, Seven under the Waste Disposal Ordinance, Seven under the Noise Control Ordinance and four under the Water Pollution Control Ordinance.

The heaviest fine in August was \$25,000.

Three companies were fined \$25,000 for discharging waste/polluting matter into the Deep Bay Water Control Zone, using powered mechanical equipment without a valid construction noise permit and failing to comply with the requirements of a noise abatement notice respectively.

September 2004

Thirty-five convictions were recorded last month (September) for breaches of anti-pollution legislation enforced by the Environmental Protection Department.

Twelve of the convictions were under the Noise Control Ordinance, 10 under the Waste Disposal Ordinance, seven under the Air Pollution Control Ordinance and six under the Water Pollution Control Ordinance.

The heaviest fine in September was \$20,000.

Two companies were fined \$20,000 for using powered mechanical equipment in breach of permit conditions and carrying out percussive piling without a valid construction noise permit.

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Hong Kong's inability to limit air and water pollution to acceptable levels is regularly the subject of public discussion. Our record in another area of environmental protection - marine conservation - is even worse, which is reflected in our reluctance to impose severe restrictions on the trade of vulnerable marine species, such as sharks.

The Editors

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SHARK'S FIN SOUP REFLECTS HONG KONG'S MARINE CONSERVATION CREDENTIALS

Marine conservation

For the last 25 years it has generally been accepted by the government and people of Hong Kong that we have a responsibility to protect our environment. Thus, the government has devoted significant resources to enable its environmental agencies, principally the Environmental Protection Department, to implement and enforce Hong Kong's range of environmental protection laws. Those laws are far from perfect. In fact, many have glaring weaknesses, particularly compared to similar legislation in other developed countries, but at least we now have a regime of statutory provisions aimed at limiting environmental degradation resulting from pollution. Whether they can be said to be effective, is another question, of course.

As well, Hong Kong's new media now regularly feature articles dealing with aspects of environmental protection, which

illustrates that the topic of responsibility for our environment is now at least part of the public consciousness.

However, the improvement in our collective environmental awareness mainly concerns steps we have taken or are contemplating to minimise environmental damage from pollution. The government has concentrated on anti-pollution legislation and initiatives. No doubt these are a very important component of environmental protection, but they are only part of a total environmental protection regime. Whilst Hong Kong has performed moderately in that field (but we have continuing, serious problems with air and water quality), its record in *conserving* the natural environment is far less defensible.

One example of this is the government's reluctance to be proactive in improving protection for marine species. Just one statistic supports this assertion: 40% of Hong Kong's terrestrial area is proclaimed as Country Parks, or other designated restricted areas (although with fragmented conservation value), whereas less than 2% of territorial waters are set aside as marine parks (4) and marine reserves (1). Even in these areas, fishing is allowed under licence, and there is strong evidence that the

licences are greatly exploiting their privileges.

Shark's fin soup and CITES

Hong Kong's passion for shark's fin soup exemplifies our - the community and the government - irresponsible attitude to marine conservation. On 18 September 2004, the South China Morning Post ran a feature article on the world trade in shark's fins. The article was prompted by the recent listing of three species of sharks - Great White, Basking and Whale - under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). These shark species are listed under Appendix 3 of the Convention, which covers species requiring protection from over-exploitation resulting from international trade. The listing requires signatories to CITES to enact domestic laws to regulate trade in the species by imposing embargoes or restrictions on possessing, importing and exporting specified species or products derived from them. CITES applies to Hong Kong because the United Kingdom and China were signatories prior to 1997.

The *SCMP* article reports that Hong Kong imports 11,000 tonnes of shark's fins each year, representing approximately 50% of world trade, with 80% destined for the mainland and the balance consumed in Hong Kong. Shark's fin imports have increased by 20,000 tonnes per annum since 1998. Supplies are sourced from approximately 80 countries, the main suppliers being Spain, Taiwan, Indonesia and the United Arab Emirates. It is reported that a single fin might be worth US\$57,000 on the open market. Fins are mainly used in soup and other dishes which are favoured by Hong Kong and mainland people.

Officially, China says that its consumption of shark's fins has decreased from 4,236 tonnes per annum in 1988 to 3555 tonnes in 2002. However, there's is considerable doubt as to the accuracy of their statistics. One NGO which monitors the trade in endangered species, *Traffic East Asia*, points out that shark's fins are often labeled as something else when imported into China.

A distressing aspect of the trade in shark's fins is the manner in which the fins are

taken. Usually the fin is hacked off the live shark, which is then released back into the sea. The shark is unable to swim and therefore endures a drawn-out, painful death. *Traffic East Asia* and other NGOs have criticised this cruel practice for many years; but without controls being imposed by the countries of origin of the fishermen - such as Hong Kong - this criticism is merely shrugged off by those involved in the shark's fin industry.

Implementation of CITES

The listing of a species under CITES is usually given legal effect in Hong Kong by subsequent listing under one of the schedules to the *Animals and Plants (Protection of Endangered Species) Ordinance* (Cap. 187), which is Hong Kong's main piece of legislation concerning conservation of endangered and vulnerable species.

"...Hong Kong imports 11,000 tonnes of shark's fins each year, representing approximately 50% of world trade..."

The three species of sharks mentioned were listed under CITES in 2003. By Executive Order, taking effect on 1 June 2004, various additional marine and fresh water species were added to the scheduled species under the *Ordinance* including the three shark species. The Whale and Basking Sharks have been listed in Part 1 of Schedule 1. The Great White Shark - which is entirely protected in some countries, such as Australia - has been listed in Part 2 of Schedule 1.

Paragraph 10 of the *Animals and Plants (Protection of Endangered Species) (Exemption) Order* (Cap.187A) exempts from Section 4 of the *Ordinance* all scheduled animals listed under Part 2 of Schedule 1. Section 4 makes it an offence to import scheduled animals without a licence. The penalty is a fine of \$50,000 and imprisonment for 6 months for importing a Scheduled animal, and a fine of \$100,000 and imprisonment of one year for importing a highly endangered species of animal.

Section 5 makes it an offence to import scheduled animal parts. The penalties are the same as under Section 4, with no

increased penalties for repeat offenders. "Scheduled parts" are listed in Schedule 2 to the *Ordinance*. No shark parts are listed in Schedule 2.

A distinction is made under the *Exemption Order* between merely scheduled species and highly endangered species. Scheduled animal species are listed in Schedule 1 to the *Ordinance*, and Schedule 6 lists highly endangered species. No shark species is included in Schedule 6, and a total of only 8 species of fish (plus several whale species) are listed.

Implementation of the *Ordinance* is the responsibility of the Agriculture, Fisheries and Conservation Department (AFCD). In keeping with the usual format of environmental protection legislation in Hong Kong, in reality there is no effective conservation measure established by the *Ordinance* because there is no real prohibition on importing, exporting or using any species of flora and fauna. Instead, the *Ordinance* only requires a person to be licensed to import or export scheduled or endangered species, or to possess them. The Director of the AFCD has the sole discretion to grant a licence, and may impose such licence conditions as he thinks fit: Section 7. Conditions may include a stipulation as to the quantity of the nominated species which licensee may import/export or possess.

However, the Director's discretion to grant a licence in respect of highly endangered species is significantly restricted by Section 7(b) which, basically, allows the Director to grant a licence only when the species is to be imported/exported for non-commercial purposes or for other specified legitimate purposes, such as for an exchange between scientists.

A licence is also required to possess a scheduled species in Hong Kong: Section 6. Once again, a distinction is made in penalties between possession of highly endangered species and otherwise scheduled species. The penalties under Section 6 are the same as under Sections 4 and 5, which respectively govern importing and exporting scheduled and endangered species.

Thus, the operative provisions imposing restrictions on importing, exporting or possessing scheduled species are Sections

4-6. However, each of these sections is made subject to Section 18. This section gives the Chief Executive complete and uncontrolled discretion to exempt any species from the requirements for Sections 4-6. Again, this is, unfortunately, a familiar format for Hong Kong's environmental legislation, whereby a legislative prohibition may be circumvented by executive discretion.

So, on the same day that the Whale and Basking sharks were included in Schedule 1, the *Exemption Order* was amended to exempt them from the provisions of section 6, which means no licence is required to possess these species (or parts of them), although a licence is required to import whole animals into Hong Kong.

As we pointed out, however, shark's fins are not included in the *Ordinance* as scheduled animal parts, and so there is no restriction on importing, exporting or possessing shark's fins. Therefore, the listing of these three species hardly adds to their protection from the vociferous demand for shark's fin soup in Hong Kong and China.

The Great White Shark is in an even worse situation. This is a species which is acknowledged to be globally highly vulnerable, if not yet endangered. As we have said, in one of their main habitats, Australia, they are entirely protected (notwithstanding the fact that shark attacks occur not infrequently in Australian waters). By comparison, Hong Kong has listed the Great White under the *Ordinance* but then has proceeded to exempt it from both the import and possession licence requirements, by virtue of paragraphs 5 and 10 of the *Exemption Order*.

Indeed, generally broad exemptions from the mildly restrictive requirements of the *Ordinance* are conferred by the *Exemption Order*. For example, paragraph 6 exempts from import licence requirements products manufactured from scheduled animals, including the endangered species listed in Part 2 of Schedule 6. The proviso is that the supplier is licensed by the country from which the goods are sourced. However, that proviso simply passes our CITES responsibility on to other governments. If the objectives of CITES are to be realistically pursued, the government should be prepared to make the hard

decisions to more severely restrict trade in products manufactured from vulnerable, and, especially, endangered species.

An interesting insight into the government's approach to its responsibilities towards international conservation of our vulnerable species is provided by the answer to the following question by the Hon. Emily Lau to the then Acting Secretary for the Environment, Transport and Works, Mr. Stephen Lam, in Legco on 3 July 2002:

It has been reported that Hong Kong is the major market for the world's shark's fin trade, and 50% of the trade is estimated to take place here. There are accusations that the trade is pushing shark species into extinction. In this connection, will the Executive Authorities inform this Council whether:

- (a) *they are aware of the severity of the problem;*
- (b) *they have plans to tackle it; if so, what are the details of such plans?*

Mr. Lam's answer was, in part:

- (a) *According to information available to us, there is no comprehensive scientific data to ascertain the effect of shark's fin trade - related hunting activities on the number of sharks of different species or their life processes. We will continue to monitor the situation closely.*
- (b) *To protect endangered species, wild animals and plants, the (Government) 50% abides by the (CITES) through enacting and enforcing the Animals and Plants (Protection of Endangered Species) Ordinance.*

Mr. Lam then described briefly the categories of listings under CITES. He concluded by saying:

According to the Ordinance, the import, export or possession of endangered species of animals and possessing a related products requires a licence that must be obtained in advance from the AFCD. Basking Sharks have already been included in the existing control regime. We will later amend the Ordinance to include Great White Sharks as well. If the control of trade under the Convention extended to

cover other shark species in future, we will revise the Ordinance accordingly.

No explanation of what the government might be doing (if anything at all) to obtain comprehensive scientific data concerning the shark's fin trade was provided by Mr. Lam, or by anyone else on behalf of the government since then, as far as we are aware. The assertion of lack of "comprehensive scientific data" is a common excuse from those uncomfortable with or opposed to implementation of realistic conservation measures, and it is a reaction of administrative agencies in many parts of the world, not just in Hong Kong.

As the *SCMP* article illustrates, sufficient, accurate information could easily be obtained from many sources if the government wanted to do so - such as from *Traffic* or *Greenpeace*. This information would leave no one in doubt that harvesting sharks to satisfy our demand for shark's fin soup is a critical threat to the very survival of many species of sharks.

The fact that more than a million sharks are killed each year should alone be sufficient to prompt the government to investigate critically Hong Kong's role in this yearly slaughter - and to consider steps which could be introduced to assist realistically (not just rhetorically) in conserving shark species.

No protection is given to the Great White Shark by listing it under the *Ordinance*. Listing the Great White and then exempting it from the rubbery restrictions of the *Ordinance* only serves to demonstrate the government's reluctance to impose conservation measures which impinge on the interests of influential sectors of the community. The government's willingness to grant exemptions to facilitate trade in species which are listed under the *Ordinance* is illustrated by its press release of 19 January 2004, which coincided with the Executive Order to list additional species (referred to above). This states in part:

Among the species affected by the changes are certain Fresh Water Turtles, Whale Shark, Basking Shark, Seahorses and Bigleaf Mahogany.

The Government will at the same time introduce the [exemptions order] to exempt

the possession or control of Whale Shark, Basking Shark, Seahorses (excluding live animals) and Bigleaf Mahogany from the licensing requirements.

The exemptions will facilitate legitimate trade in these species without compromising Hong Kong's obligations under CITES.

It has to be asked: in the context of the serious loss of numerous fauna and flora species due to pollution and exploitation - particularly during the last 50 years or so - and a government's conservation responsibilities: how can any trade be characterised as legitimate?

A more enlightened conservation policy would see the government and LEGCO prioritising reduction in the trade of products manufactured from or comprising vulnerable animal parts, rather than attempting to "facilitate legitimate trade" in such products.

As in other areas of environmental and heritage conservation, Hong Kong's administrators have a comparatively shallow perception of their responsibilities when it comes to discharging our obligation to protect threatened marine (and other) species.

LEGISLATION DIGEST

WASTE DISPOSAL (AMENDMENT) ORDINANCE 2004 - Ordinance No. 17 of 2004 (Date of Gazette: 9th July 2004)

Major amendments made to the Waste Disposal Ordinance ("WDO"), Cap. 354

The Waste Disposal (Amendment) Ordinance 2004 amends the WDO and comes into operation on a day to be appointed by the Secretary for the Environment, Transport and Works by notice published in the Gazette.

To strengthen prohibitions against illegal disposal of waste, several new sections are added to the WDO, such as: -

- (i) Section 16A: by making it an offence for the driver of a vehicle (not being a public transport carrier) and his employer, to deposit waste by use of

the vehicle;

- (ii) Section 18A: by empowering the court to order the person convicted of illegal disposal of waste to remove the waste;
- (iii) Section 23EA: by empowering the Director of the Environmental Protection Department to enter without warrant any places, other than domestic premises, to remove waste deposited illegally, in specified circumstances.

Section 16A. Prohibition of unlawful depositing of waste

Section 16A of the WDO is repealed and the following substituted: -

"(1) A person commits an offence if he deposits or causes or permits to be deposited waste in any place except with lawful authority or excuse, or except with the permission of any owner or lawful occupier of the place.

(2) For the purposes of subsection (1), if waste is deposited from a vehicle that is not being used as a public transport carrier, the following persons are regarded as causing the waste to be deposited -

- (a) the driver of the vehicle at the time when the waste is deposited from it; and*
- (b) any person employing that driver to drive the vehicle at that time.*

(3) A person charged with an offence under subsection (1) has a defence if he proves that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(4) Without limiting the general nature of subsection (3), a person establishes the defence under that subsection if he proves -

- (a) that he acted under instructions from his employer; or*
- (b) that he relied on information supplied by another person and had no reason to believe that the information was false or misleading,*

and in either case that he had no reason to believe that an offence would be committed.

(5) If a person wishes to rely on a defence involving an allegation -

(a) that the commission of the offence was not due to his acting under the instructions of his employer but was due to an act or omission of another person; or

(b) that he relied on information supplied by another person, he is not entitled, without leave of the court, to rely on the defence unless he has served on the prosecutor, at least 7 clear days before the hearing, a notice giving all information he then had that identifies or assists in identifying the other person.

(6) For the purpose of subsection (2), "public transport carrier" means a public bus, public light bus, taxi, train, light rail vehicle or tramcar."

Section 18A. Power of magistrate to order removal of waste from government land or payment of Director's expenses

A new section 18A is added to the WDO: -

"(1) If a person is convicted of an offence under Section 16A in respect of waste deposited on Government land, the magistrate may, either on application by the Director or on the magistrate's own initiative, order the person to -

(a) remove the waste from that land within the period specified in the order; or

(b) if the Director has already removed the waste, pay the Director any expenses reasonably incurred by him in carrying out the removal.

(2) An order under subsection (1) is in addition to any penalty imposed under section 18 in respect of an offence under section 16A.

(3) A person who is subject to an order under subsection (1)(a) shall inform the Director immediately upon

completion of the removal of the waste concerned by delivering by hand a written notice at his office or sending a written notice by registered post to his office address.

- (4) A person who, without reasonable excuse, fails to comply with an order made against him under subsection (1)(a) commits an offence and is liable -
- (a) to a fine of \$200,000 and to imprisonment for 6 months on the first occasion on which he is convicted of the offence;
 - (b) to a fine of \$500,000 and to imprisonment for 6 months on each subsequent occasion on which he is convicted of the offence; and
 - (c) to an additional daily penalty of \$10,000 for each day on which the offence is proved, to the satisfaction of the magistrate, to have continued.
- (5) A person who, without reasonable excuse, fails to comply with subsection (3) commits an offence and is liable to a fine at level 3.
- (6) For the purposes of this section, a reference to Government land is a reference to unleased land as defined in the Land (Miscellaneous Provisions) Ordinance (Cap. 28)."

Section 23EA. Director's power to remove waste in case of imminent risk of adverse environmental impact

A new section 23EA is added to the WDO: -

- "(1) If the Director has reasonable grounds to believe that -
- (a) an offence under section 16A has been committed in a place;
 - (b) the waste deposited in the place is likely to give rise to an imminent risk of adverse environmental impact; and
 - (c) action needs to be taken immediately to reduce or eliminate that risk, then the Director may enter the place to

remove the waste.

- (2) If a person is convicted of an offence under section 16A in respect of waste that has been removed by the Director under subsection (1), the magistrate may, on application by the Director, order the person to pay the Director any expenses reasonably incurred by him in carrying out the removal.
- (3) The Director shall not under subsection (1) enter any domestic premises unless he has first obtained a warrant issued by a magistrate under subsection (4) for that purpose.
- (4) A magistrate may, for the purpose of subsection (1), issue a warrant to the Director to enter any domestic premises if the magistrate is satisfied by information on oath that there are reasonable grounds to believe that -
 - (a) an offence under section 16A has been committed in those premises, or in a place that is accessible only through those premises;
 - (b) the waste deposited in those premises or in that place is likely to give rise to an imminent risk of adverse environmental impact; and
 - (c) action needs to be taken immediately to reduce or eliminate that risk.
- (5) Where the Director enters any domestic premises in accordance with a warrant issued under subsection (4), he shall, if required, produce that warrant.
- (6) For the purposes of this section, a reference to domestic premises includes a reference to a dwelling place on any private land."

This Ordinance also provides for a statutory basis for introducing a charging scheme for the disposal of construction waste at landfills, which is implementing by adding a new section 42 to the WDO: -

Section 42. Recovery of charges and other sums by the Director as civil debts

"The following is recoverable by the Director as a civil debt due to the

Government -

- (a) any charge or surcharge payable under this Ordinance;
- (b) any amount payable pursuant to an order made under section 18A(1)(b) or 23EA(2)."

The amendment also provides for an accounting arrangement for government waste sorting facilities which are operated by private sector contractors. The sorting charge will remunerate the operator(s) of the sorting facilities before crediting the remaining proceeds to general revenue. The accounting arrangement is implemented by adding a new section 43 to the WDO: -

Section 43. Payment to facility operator under agreement with Government

- "(1) Those parts or percentages of any charges imposed by any regulations made under section 33 which are required for -
- (a) settling a payment that a facility operator is entitled to receive under an agreement with the Government; or
 - (b) clearing or closing any advance account opened for that purpose, shall, subject to the approval of the Financial Secretary, not form part of the general revenue and may, in the case of paragraph (a), be paid to the facility operator in accordance with the agreement.
- (2) For the purpose of subsection (1), "facility operator" means a person who has entered into an agreement with the Government for the operation or management of a facility specified in Schedule 12".

HONG KONG BRIEFING

CLP projects all wind in foul air, say Greens

Hong Kong's largest electricity supplier, China Light and Power ("CLP"), on 5 July 2004 unveiled a pilot wind-energy project, to be completed by late 2007. This \$20 million project will proceed on a site identified as having enough regular wind to power a 100-metre tall turbine capable of generating 600 kilowatts of electricity.

Friends of the Earth ("FOE"), a green group, has dismissed CLP's wind power project as "propaganda", because of the proposed turbine's minimal output, representing 0.000002% of Hong Kong's power consumption last year. At the same time, the increasing level of emissions of pollutants from Hong Kong's coal-fired electricity generators has also been fiercely criticised by environmentalists.

Even though two-thirds of the fuels CLP uses are natural gas and nuclear energy, last year its coal burning generators produced 17 million tonnes of carbon dioxide, and 51,000 tonnes of sulphur dioxide, which doubled the emissions of 2002. FOE says that it would require a forest 58 times the size of Hong Kong to soak up the city's carbon dioxide wastes. The sulphur dioxide is also the cause of acid rain. Sulphur dioxide almost doubled and nitrogen dioxide surged 60% as a result of more electricity being sold to the mainland.

FOE has also claimed that CLP's operations play a big part in Hong Kong's increasingly warmer weather, because pollutants from its power plants trap the sun's heat.

June was one of the hottest on record in Hong Kong, with temperatures reaching 37 degrees Celsius. The average temperature has increased by 0.6 degrees from a decade ago, whereas that of other cities averaged only a 0.2 degrees increase, FOE said.

The government is pressing CLP to come up with proposals to curb rising emissions. Secretary for the Environment, Transport and Works, Dr. Liao, said the government faced huge challenges in controlling

regional pollution as the extent of Guangdong's economic boom was unpredictable. She said rising demand for power had forced local authorities in Guangdong to re-open closed and run-down power plants. If Hong Kong does not supply power across the boarder to Guangdong, the air pollution will get much worse from these old and inefficient plants as we share the same air, Dr Liao said.

[SCMP, 6 July 2004 & 8 July 2004

The Standard, 8 July 2004]

Developers to pay as waste bill wins nod

The Legislative Council passed the *Waste Disposal Amendment Bill* on 30 June 2004 which, the government says, will help to protect the environment. Under the bill, which becomes effective on April 1 2005, developers will have to pay for the removal and dumping of construction waste.

Secretary for the Environment, Transport and Works Bureau, Dr. Liao, said she hopes the disposal charge will discourage the unnecessary demolition of buildings and the construction waste this produces. She cited a similar bill in Taipei, which reduced construction waste by as much as 40%.

According to the government, about 6.5 million tonnes of waste were dumped in Hong Kong's three landfills last year. Just over half of this was domestic, industrial and commercial waste while 38 per cent was construction waste. Special waste, such as sludge and animal carcasses, accounted for about 9 per cent.

There are three charging systems under the bill, depending on which dumping facility is used. To dump waste at public reception facilities will cost HK\$27 a tonne, and waste dumped at sorting facilities will cost HK\$100. Waste dumped at landfills, which the government says could be filled within four years, will cost HK\$125 a tonne.

The bill was first proposed in 1995 but met with strong opposition from waste haulers who blockaded landfills for two days. The bill was revised by the Environment, Transport and Works Bureau following discussions with haulers and construction contractors. However, green groups doubt the charges will act as a deterrent.

Developers New World Development and Sun Hung Kai Properties are still deciding on whether to tear down the recently built Hung Hom Peninsula apartments estate. If the answer is affirmative, they would have to pay HK\$25 million in waste disposal but would reap billions of dollars in redevelopment profits.

Hung Hom Peninsula was built for the government's Housing Authority's Home Ownership Scheme, but has been left unsold to help stabilize Hong Kong's property prices. The building was sold this year to First Star Development, a joint venture between Sun Hung Kai Properties and New World Development.

Another problem is that the bill will not come into effect until next April, which effectively exempts those developers and contractors who submit their applications to demolish buildings between now and then.

[SCMP, 30 June 2004

The Standard, 3 July 2004]

ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

Report on the 87th Environmental Impact Assessment Subcommittee Meeting

(ACE Paper 26/2004) (by EIA Subcommittee Secretariat, July 2004)

At its 87th meeting, the Environmental Impact Assessment Subcommittee ("EIA Subcommittee") examined two sets of guidelines - prepared under the Study on Wetland Compensation - on the approaches for consideration of on-site and off-site mitigation and implementation of ecological compensation for destroyed wetlands.

Purpose of the guidelines

The purpose of the guidelines is to facilitate the consideration of on-site and off-site approaches of ecological compensation for wetland loss in line with the Technical Memorandum, and to assist project proponents in implementing wetland compensation packages.

Off-site wetland compensation on the Mainland

Regarding the issue of off-site wetland compensation on the Mainland, it is suggested by the AFCD representative that wetland mitigation sites should be as near to the affected sites as possible. The EPD representative also pointed out that since the EIA Ordinance was applicable in Hong Kong only, the implementation of ecological compensation measures outside the Territory would not be acceptable.

The timing of the implementation of off-site wetland compensation

Ideally, an off-site mitigation program should be completed before the commencement of the construction the designated project, so that the mitigation site would provide an immediate alternative habitat for the affected target species. However, AFCD representative pointed out that the ideal timing of the implementation of off-site wetland compensation should be considered on a case-by-case basis because in some cases detailed planning and coordination might be required.

The bench- marking of mitigation measures

The Study team explained that the effectiveness and the performance of wetland compensation / mitigation measures should be assessed in terms of the increase or enhancement in functionality. Moreover, the Study team also commented that the carrying capacity of mitigation sites could be bench-marked by certain parameters; for example, in terms of the number of species of birds utilizing the wetland.

Potential ecological impacts of certain security measures

A Member pointed out that certain site security measures - such as fencing - might have a potential impact on the ecology and the wetland function of the mitigation site. A balance should be maintained in achieving the site security objective of the measure and avoiding negative impacts on the ecology of the mitigation site.

Setting up of monitoring working

group

Members considered that the setting up of a monitoring working group for large-scale projects could be effective in advising on and helping monitor the implementation of mitigation measures. It was suggested that the guideline or guidance note should remind project proponents of the benefits of a monitoring working group for large-scale projects.

Conclusion

Members endorsed the two sets of guidelines and expressed a hope that AFCD would continue to produce useful guidelines and guidance notes for the reference of project proponents and stakeholders.

Report on the 86th Environmental Impact Assessment Subcommittee Meeting

(ACE Paper 19/2004) (by EIA Subcommittee Secretariat, July 2004)

At its 86th meeting, the Environmental Impact Assessment Subcommittee ("EIA Subcommittee") examined the guidance note on the Preparation of Construction Noise Impact Assessment under the EIA Ordinance.

Identification of noise sensitive receivers

The EPD subject officer explained that for the sake of efficiency and cost effectiveness, project proponents would identify representative noise sensitive receivers to assess the noise impacts of the project. The Technical Memorandum on the EIA process set out the criteria and the guidelines for evaluating noise impact.

Production of a comprehensive guidance note

The EPD subject officer explained that the objective of the guidance notes was to supplement the Technical Memorandum, using the experience-sharing approach. However, due to resource and time implications, EPD and AFCD had to compile the notes on a step-by-step approach. The guidance notes would therefore not be incorporated into the Technical Memorandum, in view of the

difference in nature of the two documents. The Technical Memorandum set out the statutory requirements of the EIA Ordinance, whilst the guidance notes were for general reference purpose.

Noise impact assessment during restricted and non-restricted hours

The EPD subject officer confirmed that noise that occurred during restricted hours would be subject to control under the Noise Control Ordinance rather than the EIA Ordinance. As regards the noise impact assessment, it should in general follow the Technical Memorandum as appropriate.

The secondary impact of noise barriers

The EPD agreed that the secondary impacts of noise barriers should not be ignored. Examples of secondary impacts are: the visual impact of the noise barriers erected in Tolo Highway, and the inconvenience caused by barriers to shop operators in Mody Road. It was agreed that the guidance notes should draw the attention of project proponents to the secondary or side effects of noise barriers.

Notice to noise sensitive receivers

Although there was no requirement in the EIA Ordinance to notify noise-sensitive receivers of the delay of a project, there is a number of ways whereby they would be informed of the progress or the delay of a project directly or indirectly. If the project was delayed and works had to be conducted in restricted hours, notice to the noise-sensitive receivers would be required as a condition of the noise permit issued under the Noise Control Ordinance. The most common practice was the posting of a notice at the work site. As regards major projects, websites would normally be set up and the public could be made aware of the progress of the projects through the websites.

TOWN PLANNING

Central reclamation plans subject to CFA's ruling

On 9 January 2004, the Court of Final Appeal decided that the Town Planning Board had erred in its interpretation of the *Protection of the Harbour Ordinance* with

regard to the government's Wan Chai reclamation project. Accordingly, the Board's decisions were quashed and the Wan Chai Outline Zoning Plan was remitted to the Board for reconsideration. This judgment applies to any harbour reclamation proposal.

The *Ordinance* establishes a unique legal status for the harbour in recognising a public need to protect and defend it from further encroachment, and to preserve and maintain its present state as much as possible.

The presumption prescribed by the *Ordinance* can only be rebutted by establishing an overriding public need for reclamation. Such need must be of greater public importance than the maintenance of the integrity of the harbour. Key language of the *Ordinance* was interpreted by the Court of Final Appeal as follows:-

Overriding - a compelling and present need which has the requisite force to prevail over the strong public need for protection and preservation.

Present - the need must arise within a definite and reasonable time frame.

Public needs - include economic, environmental and social needs of the community.

Minimum - not to go beyond what is required.

No reasonable alternative - where costs, time and delay would be relevant.

Rebuttal of presumption - each area proposed to be reclaimed must be justified. Given the demanding nature of the overriding public need test, the burden to rebut the presumption is heavy.

Cogent and convincing materials - the materials relied on to support reclamation must be cogent and convincing.

Following the court's decision, the *Society for Protection of the Harbour* applied for a judicial review of the Central reclamation project. The application was rejected. Former head of the *Society*, Winston Chu, said that in the opinion of leading counsel, the *Society* would have a good chance of winning an appeal against the decision. However, as the government would not agree to suspend reclamation works

pending the hearing of the appeal, and refused to take the appeal to the Court of Final Appeal directly, it could take two years before the final result was known.

"By that time, the reclamation would have been completed and there would be no way to restore the harbour. Hence we had to give up our appeal to the courts and instead appeal to the Hong Kong people. We remain of the view that the Central reclamation is in breach of the *Protection of the Harbour Ordinance*. As a result, Hong Kong is losing its central harbour without the government's plans having been properly tested against the principles laid down by the Court of Final Appeal judgment. This is a historic tragedy for Hong Kong" Mr Chu said.

[SCMP, 7 September 2004]

Miramar re-thinks its hotel plan

Miramar Hotel & Investment Ltd is reconsidering plans to convert commercial premises into hotels in light of land premiums proposed by the government.

Chairman, Lee Shau-kee, said the Town Planning Board was calling for a land premium of about \$1,400 per square foot on idle factories with potential hotel redevelopment in Kwun Tong and San Po Kong. Mr. Lee further stated that the company was tempted to redevelop the properties into more lucrative commercial buildings as the amount of the land premium was "not viable and is expensive".

Miramar executive director, Colin Lam Ko-yin, agreed that the amount was commercially unviable because they could not charge higher room rates given that Kwun Tong and San Po Kong were industrialised areas and the planned hotels were only three-star.

Although Miramar and the Board have been negotiating during the last six months, they could not reach an understanding over plans for the redevelopment of nine idle factory properties into three-star hotels. The plans under discussion outlined the redevelopment of up to 10,000 hotel rooms, with the largest hotel supplying about 2,000 of them.

Some analysts said it would not be surprising to see Miramar re-drawing its

hotel redevelopment plans when land premium talks had failed, given the improved value of commercial and retail property development in Hong Kong. They pointed out that Hotel Miramar's neighbour, the five-star Hyatt Regency hotel, is destined to be torn down to make way for a commercial and retail complex.

[SCMP, 1 September 2004]

The alternative to government's reclamation plan

The conservation group *Save Our Shorelines (SOS)* says that it is not too late to stop the Central to Wan Chai reclamation and that the government has not disclosed to the public viable alternatives.

The group's alternative plan involves reclamation of fewer than five hectares - compared with the 23 hectares under the government's HK\$3.75 billion Central phase III and Wan Chai phase II plans - but keeps the Central-Wan Chai bypass. This means keeping almost exactly the existing waterfront, dropping the "P2" road network and additional buildings on the reclamation, and adding a promenade and parks. Last December, the government ruled out alternatives to its proposal, saying its plan had been "properly authorized".

SOS reiterated that the government's presentation of "P2" as a tree-shaded bicycle path differed from the reality of a four- to six-lane roadway. *SOS's* chairman, John Bowden, said that there was confusion in the government's drawings for the affected waterfront. He doubted whether people really knew what they were going to get. Reclamation expert, Nigel Easterbrook, added that the government's plan blocked the harbour from the public, was "a nightmare for pedestrians" and looked "ugly". He said that it was certainly not good town planning.

SOS's plan was drafted by Easterbrook, who has had experience in constructing Container Terminal Nine and Hong Kong Disneyland. His bypass would begin near ferry pier three - servicing Discovery Bay - run parallel to the shoreline, then beneath the Convention and Exhibition Centre, emerging at Causeway Bay. *SOS* could not estimate the cost of this alternative but was certain it was cheaper than the

government's plan because it required little reclamation. *SOS* said that its information was sourced from government documents, but these were at least six months old because the group could not get access to the government's current plans.

Rejecting *SOS* claims, a Housing, Planning and Lands Bureau spokeswoman said the government had "vigilantly and dutifully" reviewed the extent of the Central phase III reclamation by applying the "overriding public need test" laid down by the Court of Final Appeal.

[The Standard, 1 September 2004]

Hunghom site proposed for cruise terminal

Cheung Kong (Holdings) is reviving its bid to build a cruise terminal in Hunghom. Its proposal seeks to turn a long strip of land on the Hunghom waterfront, including two hotel sites it owns, into a tourism centre with berthing facilities for international cruise ships.

It is estimated that the Hunghom terminal would take about five years to build. Property valuers estimate that the total investment, including land value and construction costs, could run up to \$10 billion.

A three-hectare plot of government land, sitting idle for years, will be the key to the development. The government is expected to invite proposals from developers later this year on where and how to build a new terminal, and to sign a provisional agreement with the selected developer by 2006. Other locations suggested for the terminal include Southeast Kowloon, West Kowloon, Lantau and Tsim Sha Tsui.

Cheung Kong has begun its own study on building the terminal in Hunghom, an area in which the group has a strong property portfolio. The proposed terminal would be located along the waterfront area between the International Mail Centre and the Harbour Plaza Hotel.

Cheung Kong is seeking partners in the cruise industry to pursue the venture. For its proposal to proceed, Cheung Kong has to convince the government to rezone the three-hectare site in Hunghom - now designated for commercial use - to accommodate the terminal, plus retail

space and dining premises to cope with tourist needs.

S. K. Pang Surveyors estimated the site would be worth more than \$4 billion, assuming an accommodation value of \$2,000 per sq ft. They said that a cruise terminal would certainly transform and raise the image of Hunghom as well as upgrade the environment there.

[SCMP, 16 August 2004]

REGIONAL & INTERNATIONAL

Henry embarks on odyssey of survival

When a newly born green turtle named Henry heads for the South China Sea, his life is already full of challenges. He has to survive in a tough environment, including serious pollution and uncontrolled fishing methods. From when he first launches himself into the sea from his hatchery on the beach in Malaysia, Henry has to overcome a line of fishing trawlers, escape being caught in nets, and then be lucky enough not to eat a piece of plastic or a tar ball from ship's oil.

Malaysia once was home to lots of green turtles, but in recent years, due to the challenges such as those faced by little Henry, their number has dropped dramatically and the survival of the entire species is now threatened. The situation is even worse in the case of leatherbacks, the cousin of the green turtle. Malaysia was once a major breeding ground for leatherbacks, but the population has dropped from about 10,000 a couple of decades ago to fewer than 10 now. At a recent conference called by the Worldfish Centre, researchers discussed ways to save the few remaining leatherbacks, and to prevent Henry and his kind from suffering the fate of leatherbacks.

Pollution in the South China Sea and Malaysia is becoming more serious. While economic and social development in the area continues at an impressive pace, the pollution problem has been neglected. People are short-sighted and output-oriented, in the sense that they only consider the profit made in catching turtle and other similar species. However,

without this uncontrolled fishing, the income of fishermen might be threatened. Therefore, marine conservation is a vicious circle, which might not be resolved unless the government takes positive action in helping the fishing industry.

[The Australian, 20 August 2004]

Oceans soak up carbon dioxide, slow climate change

It is an undisputed fact that the main cause of today's global warming is the great increase in emissions of carbon dioxide since the Industrial Revolution. However, the change in climate is not as dramatic as it should be, because the world's oceans are sacrificing themselves to limit global warming. Oceans have absorbed about half the carbon dioxide emitted by human activities over the past two centuries. By doing so, climate change has been significantly slowed down. Unfortunately, at the same time, seas have become more acidic and pose a threat to coral reefs, shellfish and plankton, on which all marine life depends.

Although our precious oceans have slowed climate change and so far have prevented a catastrophe from happening, other biological problems have been caused by the change in the oceans themselves. For example, North Sea birds failed to breed this summer due to plankton moving north to escape from the increasingly warm sea water.

No matter how hard our oceans try to reduce the effect of global warming, problems arise and eventually our environment suffers. Today there are numerous attempts being made to reduce the pollution problem. The solutions proposed usually are linked with advanced technology or sophisticated scientific concepts. However, even the greatest natural environmental preservation "project", the absorption of harmful emissions by our oceans, creates side effects, which indicates that there is virtually no corrective measure which will provide a foolproof solution to our pollution problems. Perhaps living a simple life is the ultimate key for our environment preservation.

[SCMP, 2 August 2004]

Defiling the last piece of clean Earth

Jokhang Temple, one of the most sacred pilgrimage sites for Tibetans, attracts many visitors who come here to understand the knowledge of Tibetan Buddhism. However, the Temple's fame also causes trouble for its resident monks, who are kept busy sweeping floors rather than mediating, owing to the fact visitors throw cigarette butts, empty film cartons and other litter everywhere in the Temple's grounds.

Nyima Tsering, the most senior monk in the Temple, believes that Tibet is humanity's last piece of clean Earth. He uses the Buddhist concept — the relationship between “reason” and “result”—to explain the cycle of life and to urge people to save the environment. He advises corporate leaders not to be too invasive and aggressive in their corporate dealings, as this will cause serious and irreparable harm to the environment. Tsering speaks like an activist challenging the G8 at Cancun, criticizing multinational corporations' irresponsible conduct for damaging the environment, and says environmental degradation is a problem for everyone on earth. Whilst globalization is now an inescapable trend, a balance between everything is the key for environment preservation.

[SCMP, 7 August 2004]

Global alert as 4WDs turn world to dust

Dust storms, produced by the four-wheel-drive epidemic, are damaging our environment and human health. There is a lot of off-road driving in the world today, especially in the Middle East and southwest US. Off-road driving destroys a desert's fragile crust and sweeps clouds of fine dust particles into the air. Professor of geography at Oxford University, Andrew Goudie, says that this “Toyotarisisation” has led to a great increase in global dust. Scientists estimate that each year 3 billion tonnes of dust are whipped thousands of kilometres around the world by wind currents, which generates dust storms across many parts of the world.

Besides off-road driving, environmentalists say that drought, wind, overgrazing and deforestation have led to

an increase of dust in places such as Chad and central China.

Increased dust in the air also poses a direct threat to human health. Moreover, dust-storms pump herbicides and pesticides out of agricultural soil and dried-up lake beds and send them out into the atmosphere. They carry allergy-sensitive materials which can affect people's health. Dust storms could also adversely affect the future of African rural areas.

Car drivers might not have expected that the excitement they have in off-road driving would be totally outweighed by the air pollution problems they caused. Who could link respiratory diseases with off-road driving? But the facts supporting this link are overwhelming. What we should do is simply control off-road driving. For example, licences should be issued to off-road drivers, and strict quotas should be imposed to limit the number of people driving off-road.

[*The Weekend Australian*, 21/22 August 2004]

Soaring demand in China boosts illegal trade in ivory

Although sales of illegal ivory products in Thailand have diminished, China still has a great demand for these and similar products. Smugglers are exploiting lax sea and land border controls in Southeast Asia to supply China with ivory and endangered species or their products. For example, turtles and other wild animals are transported by air cargo, with the Laotian capital Vientiane as the transit point. Sadly, Thailand itself has only a limited number of remaining elephants, so the ivory is not from Thailand but rather from Africa.

Money is always a great temptation for people to exploit wildlife. Rapid economic development in China has brought unprecedented wealth to some Chinese and turned them into the most materialistic group of people in the world. They want to satisfy themselves with the most precious materials in the world, including ivory. This is a tragedy for our environment, and for today's Chinese community.

[SCMP, 17 September 2004]

The misery of life in cancer county

The seriously polluted waters of the lowlands of Henan, Shenqiu County, have caused numerous deaths. Lying inside the Huai River basin, Shenqiu County is one of the nation's most polluted watersheds. According to the State Environmental Protection Administration, an estimated 1.2 million tonnes of hazardous wastes are dumped annually into the Huai River's tributaries by nearby factories.

Villagers living there have contracted sore throats and headaches just from standing near the water, whilst those who have direct contact with the polluted water immediately develop rashes. Many who have consumed the water suffer from long-term illness or even fatal diseases. The situation is worsened by the fact that adequate medical treatment is basically non-existent. If one does not want to be tortured by illness, one has to borrow heavily to seek medical treatment.

Government officials are reluctant to admit liability for contaminating the water because they would thereafter be responsible for the medical costs of the villagers. Investigations would also expose them to their close ties with the polluting factories.

If the government declines to offer assistance, the villagers' last resort is to access cleaner water supplies by digging uncontaminated wells of 300 metres or more depth, and to use water filters.

[SCMP, 11 September 2004]

Welcome to HK, your air pollution reading today is ... 201

Air pollution readings continue to be very high recently, indicating that the air pollution problem in Hong Kong is becoming more serious rather than improving. Air quality is particularly poor in Mongkok and Central, both of which regularly record a reading of over 100. Poor air quality leads to eye irritations, coughing and even chromosome changes.

An academic responsible for research of air quality has observed that serious air pollution in Hong Kong is caused by pollutants drifting from the mainland due, in turn, to the rapid development of the Pearl River Delta. The pollution is also worse in calm and sunny weather, when pollutants are not blown away by strong winds.

This Quarterly Report does not constitute legal advice given on any particular matter. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors and omissions. Further information and enquiries in respect of this quarterly should be directed to Fred Kan & Co. or any of our following associate firms:

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